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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

1 STATE OF CALIFORNIA, *et. al.*) Case No.: C 06-04333 PJH
 2 Plaintiffs,) Assigned for all purposes to the
 3) Hon. Phyllis J. Hamilton
 4 vs.)
 5 INFINEON TECHNOLOGIES AG, *et. al.*,) **PLAINTIFF STATE OF FLORIDA'S**
 6 Defendants.) **NOTICE OF MOTION AND**
 7) **MOTION TO STRIKE**
 8)
 9) **ORAL ARGUMENT REQUESTED**
 10)
 11) Hearing date:
 12) Time: 9:00 a.m.
 13) Courtroom: 3, 17th Floor
 14) Judge: Hon. Phyllis J. Hamilton

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**PLAINTIFF STATE OF FLORIDA'S NOTICE OF MOTION
AND MOTION TO STRIKE**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Federal Rule of Civil Procedure 12(f), the Plaintiff State of Florida will and hereby does move to strike, in part, Defendants' Affirmative Defenses to Plaintiffs' Third Amended Complaint. This motion shall be heard on August 6, 2008 at 9:00 a.m., or as soon thereafter as the matter may be called, in the courtroom of the Honorable Phyllis J. Hamilton, United States District Judge, United States District Court, 450 Golden Gate Ave., San Francisco, California, 94102.

This motion is based upon this Notice of Motion; the accompanying Memorandum of Points and Authorities; the complete files in this action, including Defendants' Affirmative Defenses; argument of counsel; and other such and further matters as this Court may consider.

DATED:

July 2, 2008

Respectfully Submitted,
STATE OF FLORIDA

/s/ *Lizabeth Leeds*
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Attorneys for the
State of Florida

**MOTION TO STRIKE SEVERAL OF DEFENDANTS' AFFIRMATIVE
DEFENSES RELATING TO THE STATE OF FLORIDA**

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff State of Florida (Florida) respectfully submits this memorandum of points and authorities in support of its Motion to Strike.

INTRODUCTION

On May 13, Defendants filed with this Court Answers and numerous Affirmative Defenses to Plaintiff's Third Amended Complaint. A number of Defendants' Affirmative Defenses misstate and misconstrue the current state of both Florida and federal law and therefore should be stricken.¹ This motion requests that this Court strike NEC Electronics America Inc.'s sixty-ninth Affirmative Defense (The *Mack* Affirmative Defense). Additionally, Florida moves to strike Elpida Memory, Inc.'s and Elpida Memory (USA) Inc.'s sixtieth Affirmative Defense, Hynix's sixty-second Affirmative Defense, Infineon Technologies North American Corp. and Infineon Technologies AG's forty-third Affirmative Defense, Micron Technology Inc.'s and Micron Semiconductor Products, Inc.'s forty-third Additional Defense, Nanya Technology Corporation's Affirmative Defenses eleven and sixty-four, Nanya Technology Corporation USA's Affirmative Defenses eleven and sixty-four, and NEC Electronics America Inc.'s sixty-seventh Affirmative Defense. (The FDUTPA Affirmative Defenses)²

¹ The Plaintiff State of Florida specifically reserves its right to contest all of Defendants' Affirmative Defenses at a later date.

² For the convenience of the Court, Florida has attached an appendix of the specific Affirmative Defenses that are the subject of this motion. Additionally, Defendants' Affirmative Defenses each adopt and incorporate the Affirmative Defenses of all of the other Defendants, and therefore each section of this motion to strike includes each

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3 I. STANDARD
45 Florida brings this motion to strike the *Mack* Affirmative Defense and the FDUTPA
6 Affirmative Defenses because they are legally insufficient. “Federal Rule of Civil Procedure
7 12(f) provides that the court ‘may order stricken from any pleading any insufficient defense.’”8 *Butler v. Adoption Media, LLC*, No. C 04-0135 PJH, 2005 U.S. Dist. LEXIS 46208 (N.D. Cal.
9 June 21, 2005) (quoting the 2005 Federal Rules of Civil Procedure) (granting, in part,
10 plaintiffs’ motions to strike when defendants’ affirmative defenses were legally insufficient).11 The essential function of a Rule 12(f) motion is to “avoid the expenditure of time and money
12 that must arise from litigating spurious issues by dispensing with those issues prior to trial . . .
13 .” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510
14 U.S. 517 (1994) (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.
15 1983)).16
17 II. THE *MACK* AFFIRMATIVE DEFENSE SHOULD BE STRICKEN BECAUSE
18 *MACK*, WHICH IS VALID AND CONTROLLING, PROVIDES STANDING TO
19 INDIRECT PURCHASERS UNDER FLORIDA LAW.20
21 The *Mack* Affirmative Defense22
23 avers that Plaintiff’s claims are barred, in whole or in part, to the extent that Plaintiff, or
24 those on whose behalf Plaintiff purports to bring the Complaint, alleged standing rests
25 upon the First District Court of Appeal’s holding in *Mack v. Bristol-Myers Squibb Co.*,
26 673 So. 2d 100 (Fla. 1st DCA 1996). That case is not controlling on this Court, and was
wrongly decided.27
28 See NEC Electronics America, Inc.’s Answer to Third Am. Compl. at 57.
Defendant, including Mosel Vitelic Inc. and Mosel Vitelic Corporation, to the extent they have adopted the
challenged affirmative defenses.

1 *Mack*, the rule of law in Florida, provides standing to indirect purchasers and under
 2 applicable legal principles should be considered controlling by this Court. In the absence of
 3 interdistrict conflict, district court decisions bind all Florida trial courts and, as to substantive
 4 law claims, are therefore also binding on this Court.
 5

6 *Mack v. Bristol-Myers Squibb Co.* was decided by Florida's First District Court of Appeal
 7 in 1996. Since *Mack* was decided no other Florida district court decision has been rendered that
 8 is in conflict with *Mack*. The Florida Supreme Court has repeatedly held that "the decisions of
 9 the district courts of appeal represent the law of Florida unless and until they are overruled by
 10 this Court." *Pardo v. Florida*, 596 So. 2d 665, 666 (Fla. 1992) (quoting *Stanfill v. Florida*, 384
 11 So. 2d 141, 143 (Fla. 1980)). Consequently, in the absence of interdistrict conflict, a district
 12 court decision binds all Florida trial courts. *Id.* (citing *Weiman v. McHaffie*, 470 So. 2d 682,
 13 684 (Fla. 1985)).
 14

15 Moreover, the United States Supreme Court has found that "[a]n intermediate state
 16 court in declaring and applying the state law is acting as an organ of the State and its
 17 determination, in the absence of more convincing evidence of what the state law is, should be
 18 followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field*, 311
 19 U.S. 169, 177-78 (1940), cited in *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).
 20

21 When a federal court sits in diversity jurisdiction over a state law claim it must apply
 22 state substantive law in resolving the dispute. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
 23 When a federal court sits in pendent, or supplemental, jurisdiction it must apply the rule of
 24 *Erie*. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).
 25

1 Because *Mack* is controlling law throughout Florida, when considering Florida's
 2 substantive law claims, this Court should consider it controlling as mandated by United States
 3 Supreme Court precedent. *See, e.g. Fidelity Union Trust, Erie and United Mine Workers.*
 4

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6 III. THE "FDUTPA AFFIRMATIVE DEFENSES" SHOULD BE STRICKEN
 7 BECAUSE THE FLORIDA DECEPTIVE AND UNFAIR TRADE
 8 PRACTICES ACT PERMITS UNFAIR COMPETITION CLAIMS FOR
 9 PRICE-FIXING BY
 INDIRECT PURCHASERS.

10 The FDUTPA Affirmative Defenses aver that Plaintiff's claims are barred, in whole or
 11 in part, because, pursuant to Fla. Stat. § 501.202(3), FDUTPA must be construed in a manner
 12 consistent with federal antitrust laws. Because Plaintiffs' injuries are too speculative,
 13 derivative, indirect, and remote to confer standing under federal antitrust law, they also do not
 14 confer standing under FDUTPA. *See, e.g. Answer of Def. Infineon Technologies North*
 15 *America Corp. and Infineon Technologies AG to Third Am. Comp. at 62.*

16 *Mack*, the rule of law in Florida, provides standing to indirect purchasers under
 17 FDUTPA, section 501, through a cause of action that is completely independent of the Florida
 18 Antitrust Act, section 542.

19 According to *Mack*, "[a] fair reading of section 501.211 reveals no intention by the
 20 legislature to limit suits for price-fixing to direct purchasers only." 673 So. 2d at 105. Section
 21 501.211 describes, in part, the individual remedies available under the FDUTPA. The *Mack*
 22 court found that "[p]ermitting indirect purchasers to sue under the Florida DTPA effectuates
 23 the consumer protection policies of the Florida DTPA, but is not adverse to the purposes of the
 24 Antitrust Act." *Id.* at 110.

1 This reading of *Mack* is not limited to Florida courts. At least one federal court has
 2 applied *Mack* to the facts before it and found it to be controlling. In *FTC v. Mylan Labs., Inc.*,
 3 the court found that Florida indirect purchasers have standing under the FDUTPA, even though
 4 they did not have standing to sue under either the federal or Florida antitrust laws. 62 F. Supp.
 5 2d 25, 46-47 (D.D.C. 1999) (following the holding in *Mack v. Bristol-Myers Squibb Co.*). In
 6 *Mylan*,

7 The Court [did] not dismiss Florida's claim seeking damages for indirect purchasers
 8 under the FDUTPA. Although allowing such a claim increases the risk of duplicative
 9 recovery as discussed above, the Florida Court of Appeals has specifically held that an
 10 indirect purchaser has standing to bring a suit for damages under the FDUTPA.

11 *Id.* at 46.

12 Florida statute § 501.202(3) does not, as Defendants' state in the FDUTPA Affirmative
 13 Defenses, require that FDUTPA be construed in a manner consistent with federal antitrust law.

14 Rather, it states that "The provisions of this part shall be construed liberally to promote
 15 the following policies:....(3) To make state consumer protection and enforcement consistent
 16 with established policies of federal law relating to *consumer protection*(emphasis added)."'

17 Contrary to Defendants' assertions, no court has held that a claim under FDUTPA must
 18 "be construed in a manner consistent with federal antitrust laws." See FDUTPA Affirmative
 19 Defenses. In fact, as discussed above, both the state and federal courts that addressed this issue
 20 held that antitrust standing was not required under FDUTPA.

21 In this case, the State of Florida has asserted clearly permissible FDUTPA substantive
 22 law claims under Florida law on behalf of indirect purchasers. Under the supplemental
 23 jurisdiction of this Court, the rule of *Mack* should be followed and Defendants' FDUTPA
 24 Affirmative Defenses should be stricken.

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7 **CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully submit that this motion to strike be
9 granted without prejudice.
10

11
12 DATED: July 2, 2008

Respectfully Submitted,
13
STATE OF FLORIDA

14
15 */s/ Lizabeth Leeds*
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17 Eli A. Friedman

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19 Attorneys for the
20 State of Florida

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APPENDIX A

FDUTPA AFFIRMATIVE DEFENSES

ELPIDA MEMORY, INC. AND ELPIDA MEMORY (USA) INC.

SIXTIETH DEFENSE

Plaintiffs' claims under Fla. Stat. §§ 501.201, *et seq.* are barred, in whole or in part, because pursuant to Fla. Stat. § 501.202(3), the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) must be construed in a manner consistent with federal antitrust laws. Because Plaintiffs' injuries are too speculative, derivative, indirect and remote to confer standing under federal antitrust law, they also do not confer standing under FDUTPA.

HYNIX SEMICONDUCTOR INC. AND HYNIX

SEMICONDUCTOR AMERICA INC.

SIXTY-SECOND DEFENSE

Plaintiffs' claims under Florida Stat. 501.201 *et seq.* are barred, in whole or in part, because, pursuant to section 501.202(3), the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") must be construed in a manner consistent with federal antitrust laws. Because Plaintiffs' injuries are too speculative, derivative, indirect and remote to confer standing under federal antitrust law, they also do not confer standing under FDUTPA.

INFINEON TECHNOLOGIES NORTH AMERICA CORP.

AND INFINEON TECHNOLOGIES AG

FORTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims under Florida Stat. §§ 501.201 *et seq.* are barred, in whole or in part, because pursuant to § 501.202(3), the Florida Deceptive and Unfair Trade Practices Act

1 (“FDUTPA”) must be construed in a manner consistent with federal antitrust laws. Because
 2 Plaintiffs’ injuries are too speculative, derivative, indirect and remote to confer standing under
 3 federal antitrust law, they also do not confer standing under FDUTPA.
 4

5 **MICRON TECHNOLOGY, INC. AND MICRON**
 6 **SEMICONDUCTOR PRODUCTS, INC.**
 7 **FORTY-THIRD ADDITIONAL DEFENSE**

8 Plaintiffs’ claims under Florida Stat. §§ 501.201 *et seq.* are barred, in whole or in part,
 9 because pursuant to § 501.202(3), the Florida Deceptive and Unfair Trade Practices Act
 10 (“FDUTPA”) must be construed in a manner consistent with federal antitrust laws. Because
 11 Plaintiffs’ injuries are too speculative, derivative, indirect and remote to confer standing under
 12 federal antitrust law, they also do not confer standing under FDUTPA.
 13

14 **NANYA TECHNOLOGY CORPORATION**

15 11. The laws of various states (including, without limitation, Florida Stat.
 16 § 501.202(3)) must be construed in a manner consistent with federal antitrust law. Because
 17 Plaintiffs’ alleged injuries are too speculative, derivative, indirect and remote to confer
 18 standing under federal antitrust law, they also do not confer standing under state law.
 19

20
 21 64. Plaintiffs’ claims under Florida Stat. §§ 501.201, *et seq.*, are barred, in
 22 whole or in part, because pursuant to § 501.202(3), the Florida Deceptive and Unfair Trade
 23 Practices Act (“FDUTPA”) must be construed in a manner consistent with federal antitrust
 24 laws. Because Plaintiffs’ injuries are too speculative, derivative, indirect and remote to confer
 25 standing under federal antitrust law, they also do not confer standing under FDUTPA.
 26

NANYA TECHNOLOGY CORPORATION USA

11. The laws of various states (including, without limitation, Florida Stat. § 501.202(3)) must be construed in a manner consistent with federal antitrust law. Because Plaintiffs' alleged injuries are too speculative, derivative, indirect and remote to confer standing under federal antitrust law, they also do not confer standing under state law.

64. Plaintiffs' claims under Florida Stat. §§ 501.201, *et seq.*, are barred, in whole or in part, because pursuant to § 501.202(3), the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") must be construed in a manner consistent with federal antitrust laws. Because Plaintiffs' injuries are too speculative, derivative, indirect and remote to confer standing under federal antitrust law, they also do not confer standing under FDUTPA.

NEC ELECTRONICS AMERICA, INC.'S

SIXTY-SEVENTH AFFIRMATIVE DEFENSE

(Lack of Standing Under FDUTPA)

67. As a sixty-seventh and separate affirmative defense, with respect to the State of Florida, NEC avers that Plaintiff's claims are barred, in whole or in part, because, pursuant to Fla. Stat. § 501.202(3), the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") must be construed in a manner consistent with federal antitrust laws. Because Plaintiffs' injuries are too speculative, derivative, indirect, and remote to confer standing under federal antitrust law, they also do not confer standing under FDUTPA.

MACK AFFIRMATIVE DEFENSE

**NEC ELECTRONICS AMERICA, INC.'S
SIXTY-NINTH AFFIRMATIVE DEFENSE**

(Lack of Standing Based on *Mack*)

69. As a sixty-ninth and separate affirmative defense, with respect to the State of Florida, NEC avers that Plaintiff's claims are barred, in whole or in part, to the extent that Plaintiff, or those on whose behalf Plaintiff purports to bring the Complaint, alleged standing rests upon the First District Court of Appeal's holding in *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. 1st DCA 1996). That case is not controlling on this Court, and was wrongly decided.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **State of California et al, v. Infineon Technologies AG et al.**

No.: C-06-4333 SC

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Florida State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 2, 2008, I served the attached Motion to Strike by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at PL-01 The Capitol, Tallahassee, FL 32399-1050, addressed as follows:

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28

I declare under penalty of perjury under the laws of the State of Florida the foregoing is true and correct and that this declaration was executed on July 2, 2008, at Tallahassee, Florida.

Jennifer Morgan-Byrd



Signature